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SUPREME COURT

No. 516

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15547
CIVIL

UNITED STATES OF AMERICA — *Appellant*

v.

LATROBE CONSTRUCTION COMPANY, BRAGG'S ELECTRIC CONSTRUCTION COMPANY, ARKANSAS FOUNDRY COMPANY, GENERAL STEEL PRODUCTS COMPANY, JEFFERY LUMBER COMPANY, PADGETT LUMBER COMPANY, CHOCTAW, INC., IRA SHERRILL, MILL & MINE SUPPLY COMPANY AND CROW-BURLINGAME COMPANY — *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

PETITION FOR REHEARING

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Come appellees, Latrobe Construction Company, Bragg's Electric Construction Company, Arkansas Foundry Company, General Steel Products Company, Jeffery Lumber Company, Padgett Lumber Company, Choctaw, Inc., Ira Sherrill, Mill & Mine Supply Company and Crow-Burlingame Company, as petitioners and present this, their Petition for Rehearing of the above entitled cause, and in support thereof respectfully show:

PREFACE

The appellees file this Petition for Rehearing fully recognizing the administrative burden which would be imposed upon the Court if carefully considered decisions were routinely reviewed merely at the request of a losing litigant. The opinion of the Court clearly reflects independent research and study beyond the points raised and authorities cited in the briefs on appeal. The fact that this is a case of first impression, and one which will probably become a landmark case, justifies appellees in earnestly requesting the Court to consider this their sincere Petition for Rehearing. While appellees do not concede that this case should be governed by "Federal Common Law", it is their contention that the results of the District Court trial should be the same no matter what law is deemed to govern.

POINT I

The opinion of the Court overlooks the fact that, stripped of all complicating factors, this litigation is nothing other than the trial of title to buildings and improvements located upon land in Arkansas.

(1)

The Court, at page 12 in its opinion, states:

> "The Government, by virtue of a valid contract, authorized by the Constitution and Statutes of the United States, bargained for and obtained a paramount lien upon WESTMORELAND'S PROPERTY."

The Court did not determine the title which Westmoreland acquired, for under the ruling such title was immaterial. The Court held that, irrespective of the fact that Westmoreland never acquired any property which was not subject to the liens of appellees, nevertheless such liens were ineffectual as to appellant because of a "Letter Con-

tract". This Letter Contract, and implementing mortgage, were negotiated by Government employees of somewhat less than cabinet rank. The basic effect of the Court's decision is to authorize Government administrative officers, presumably of any rank, to contract for delivery to the Government of titles of a greater dignity than those acquired by the person with whom the Government contracts. Specifically, in this case, the Court holds that a contracting officer of a temporary bureau could make a contract with Westmoreland whereby property to be acquired by Westmoreland, and which *upon acquisition* was subject or encumbered with liens, was to the Government to be deemed free of such liens.

Under no known law, either of any State or Federal Law, can a mortgagee under an after-acquired property clause acquire a title better or greater than that of the mortgagor. This result is, however, the final effect of the decision in this case. It cannot be doubted or argued but that the title which Westmoreland acquired from appellees was from the beginning burdened with statutory liens in favor of appellees. Neither can it be argued nor doubted but that Arkansas law governed the title to Westmoreland's property, acquired by Westmoreland as a result of improvements constructed or furnished by appellees. No one will contend that Westmoreland, in its various dealings with appellees, was governed by anything other than Arkansas law, and if this be true, then the *title which Westmoreland had* to pass to the Government under the after-acquired title provisions of the mortgage, was strictly a matter of Arkansas law.

While this point was argued in the lower court, it was not considered in this Court on appeal. The District Court's opinion is highly illuminating and cites the decision of the Supreme Court of the United States in *Bear Lake and River Waterworks Irrigation Co.* v. *Garland*,

164 U.S. 1, 41 L. Ed. 327, in which this highest of Federal Courts, stated:

> "On the contrary, the latter claim to bring their case within the rule recognized in this Court that even under the after-acquired property clause in a mortgage, if property be burdened with an encumbrance or lien at the very time of coming into the possession or ownership of the mortgagor, such encumbrance remains prior and superior to the lien of the mortgage, although it was actually subsequent thereto in point of time. * * * The Bear Lake Company, therefore, never had any legal or equitable title to the land over or through which the ditch for the canal was dug as against the Government until the ditch was completed. As the ditch was completed by the labor of the contractor, and the very title of the mortgagor thereto was itself created by his labor, *the lien attached to the property as it was created and came into being, and arose coincident with the ownership of the ditch by the mortgagor and the property came into the hands of the mortgagor burdened with this lien, which remained superior to that of the mortgage.* * * * The material fact to remember is that the sole title to the land or the right-of-way which the Bear Lake Company has, whether legal or equitable, is transferred to that company only by virtue of the work previously done upon the land by the contractors who thereby fulfilled the condition upon the performance of which such transfer or the right of such transfer depended. Under these circumstances, it is proper to say that the title to the land was transferred subject to the contractor's lien for the work which made the transfer possible and by means of which it was accomplished. * * * The very question in issue is whether the mortgage was a valid encumbrance upon any after-acquired land prior to these liens."

We submit that the rule as announced by the Supreme Court of the United States is that no mortgage can ever

obtain under an after-acquired property clause a title better than that which rested in the mortgagor. That rule is not followed in this case.

POINT II

The opinion of the Court overlooks the fact that appellees have no contractual relation with the Government and are not bound by the terms of the contract to which they were not a party.

The opinion of the Court as a practical matter holds that appellees who were not a party to the "Letter Contract" or implementing mortgage are to be divested of their statutory lien rights by virtue of such contract. We do not think the Court intended this holding, for such would be contrary to the Fifth Amendment to the Constitution of the United States which provides that no person shall be deprived of property without due process of law "nor shall private property be taken for public use without just compensation".

Again, it cannot be argued but that the title which Westmoreland acquired to the improvements on Arkansas land is to be determined by the contracts between Westmoreland and appellees for the construction of said improvement. For example: Westmoreland (not the Government) contracted directly with Arkansas Foundry (an Arkansas corporation) in Arkansas for the erection of structural steel, to be fabricated and erected in Arkansas. There is not a scintilla of Federal law involved in such a contract whereby Westmoreland's property was created, and the title which Westmoreland obtained to the steel in place in the improvement is dependent entirely upon the contract between Westmoreland and the Foundry. Until Westmoreland got some title it could not be subject to the mortgage, and the title it got is determined the "Westmoreland-Foundry acquisition contract" and not by

the Government's mortgage recitals. If this Arkansas law gives to appellees a valid lien, such is a vested property right, which cannot be defeated nor divested by a contract to which such appellees were not a party.

POINT III

The Court overlooked the fact that all of the cases cited by the Court in support of its holding were based upon specific Acts of Congress granting the United States liens. The conclusion of the Court: "We can see no reason why the Government should not be in as good a position under a valid contractual lien as it would be under a lien created by Statute" and which is, in fact, the foundation of the decision, is founded upon an extension of statutory law into the field of private contracts. Under the "Supremacy Clause", Congress may declare ineffective State Laws; but this power does not reside in every one of the thousands of Government employees routinely negotiating contracts. The rights of the *contracting parties* may be determined by "Federal Common Law", but the rights of strangers arising out of a different contract are to be adjudicated under that different contract. The Government cannot by its contract divest strangers to such contract of their statutory liens arising out of an entirely different contract.

POINT IV

The Court in the opinion, at page 8, held that "the issue of whether *federal common law* or Arkansas law should be applied was before the trial court".

In so holding, appellees urge that the Court overlooked the following facts:

(1) There are two separate appeals arising out of the Government-Westmoreland deal, No. 15500 in which Westmoreland is appellant and the United States is ap-

pellee, and No. 15547 in which the United States is appellant and Latrobe, et al, are appellees. The issues, as between the parties, although there was only one complaint filed in the District Court, were so diverse and unconnected that two appeals were considered necessary and were taken.

(2) The question of the applicability of Federal Law was never raised by the Government as governing any issue between the Government and these appellees.

(See statement of Trial Court in the hearing between the Government and the State on the question of taxes. This was sent to the Court of Appeals by the U. S. District Clerk.)

(3) The *brief* filed by the Government on the motion of Westmoreland to dismiss the Government's complaint wherein the Government stated, "the applicable law is Federal rather than State", referred to in this Court's opinion at page 6, was never referred to again by the Government during the trial of the case on the merits, nor was that brief referred to or mentioned by the Government in its Brief in Chief on this appeal. The first time the Government ever attempted to rely on this brief as notice to anyone that the Government contends that Federal Law applies to any phase of this case, or as controlling as to any issues between the Government and those appellees, was in its reply brief at pages 2 and 3.

(4) The brief itself (see appendix to the Government's Reply Brief) shows on its face that no reference is made to these appellees and no copy was served on any of the appellees on their counsel. The only contention made by the Government in said brief as to the applicable law is that it governs any issue as between the contracting parties, viz., the Government and Westmoreland and no

contention is made that this applies as to rights of third parties, such as these appellees.

(5) The trial briefs filed in the Court below by the Government in support of its claim of priority, under its mortgage, to the Statutory lien claims of the appellees (these briefs were all forwarded to this Court by the Clerk of the District Court as part of the record on appeal) do not mention the case of *United States* v. *Allegheny County*, 322 U.S. 174, 182, and the Government did not rely on that case, but argued and attempted to rely solely on the law of Arkansas.

(6) There is, in our jurisprudence, no "federal common law".

"Mr. Justice Storey long ago wrote, recognizing the non-existence of federal common law, this trenchant pertinent passage in *United States* v. *State Bank of North Carolina*, 1832, 6 Pet. 29, 31 U.S. 29, 35, 8 L. Ed. 308:

> 'The right of priority of payment of debts due to the government, is a prerogative of the crown well known to the common law. * * * The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes.'" *United States* v. *White Bear Brewing Co.*, 227 F. 2d 359, 366.

(7) The government in this case must rely on federal statutory enactments, and the Act under which it was acting in its Contract with Westmoreland, the Defense Production Act of 1950, 50 U.S.C. Appendix § 2061 *et seq.*, did not in terms give it any prior liens, nor has the government ever shown or claimed such power or right under any "terms and conditions" "deemed necessary" by the President.

POINT V

At page 9 of the opinion this Court states:

"We believe that the priority of liens involved in this appeal should be determined by *federal law*".

The appellees submit that in so holding the Court overlooked:

(1) That the Contract and the mortgage implementing the Contract on which the Government relies were written, executed and recorded with Arkansas law and the requirements of that law in mind.

(a) The form of mortgage is an Arkansas form, meeting the requirements of Arkansas law.

(b) The acknowledgment is the Arkansas Corporation form of acknowledgment.

(c) The mortgage was filed for record in the counties in Arkansas in compliance with the Arkansas law. §§ 16-101 and 51-1001 Ark. Stats., 1947 Ann.

(d) Special Arkansas Counsel was employed by the Government for advice re Arkansas law and procedure as to mortgage in Arkansas, and more especially for advice as to liens and the effect of Arkansas lien law on mortgaged property, that is the priority as between statutory liens and mortgage liens.

(e) The opinion given by this special counsel employed by the Government clearly shows the Government in contracting with Westmoreland, had in view the Arkansas law re liens of material-men and was trying to guard against them as far as it could by a contract with *Westmoreland*.

"TRIAL EXHIBIT NO. 22

Letter from Harry E. Meek
Dated June 19, 1952

Little Rock, Arkansas

"'Mr. Albert H. Green,
General Counsel,
Defense Materials Procurement Agency,
Washington, D. C."

* * * *

'With reference to liens which may hereafter result from the construction of the plant, please note the following: Under our Arkansas Statute where a mortgage is given to secure a loan to finance the construction of an improvement, the mortgage takes priority over any statutory liens created in connection with the construction of such improvement. See *Sebastian Bldg. & Loan Assn.* v. *Minten*, 181 Ark. 700; 27 S.W. 2d 1011. However, in a situation of this kind I have always been afraid to rely 100% on this statute. It could be argued that this statute applies only when the proceeds of the loan are disbursed in one lump sum before construction commences, and does not apply to situation where the mortgage proceeds are advanced from time to time as construction progresses. Therefore, I think that it would be advisable if, in connection with each future disbursement, some precaution be taken by the government to protect itself against currently accruing construction liens. Most certainly the Government's mortgage might *fail as against removable installations of machinery which* had been purchased under conditional sales contracts.'"

(Appellees Supplemental Record pp 11-12)

(f) This is further shown to be a fact when this special counsel deemed it necessary to have a supplemental mortgage containing the provision quoted by this Court in the opinion at page 5.

POINT VI

The Court at page 12 of the opinion resolves the equities in favor of the United States, such holding being based upon the fact that the Government's mortgages were *recorded* before any labor or materials were furnished by any of the appellees. The appellees submit that in so holding this Court overlooked:

(1) That the Arkansas Miner's Lien Law was in existence and in force and effect long before the Government's mortgage was executed and recorded and that the Government and its attorneys were fully aware of it and its import and effect upon priorities as between a mortgagee and Miner's Lien Claimants;

The Miner's Lien Statute is Act 615 of 1923; Sections 51-701 to 51-708 inclusive, Ark. Stats., 1947 Ann.

In passing upon a similar contention or situation in the case of *Bear Lake & River Water Works Irrigation Co. v. Garland*, *supra*, the Supreme Court said:

> "* * * It is also said that the mortgagee occupies a position superior in equity to that of the Corey firm because the mortgage was executed and on record a long time before the firm did any work upon the ditches, and it must have known, or at any rate notice from the record will be imputed to the firm that the mortgage was in existence. * * * Upon the same principle, the mortgagee would know that it could acquire no lien upon this property superior to that of the lienors, and that the title to the property created by the lienors would come to the Bear Lake Company burdened with their lien. It is plain that in this light the equity of the lienors is superior to that of the mortgagee, and their lien should, if possible, be preferred."

(This quotation also supports the position of appellees in their Point I.)

(2). That the Government had not paid one cent on the material of appellees which was in original packages and in the warehouse, unused, and that to allow the government to take this property would be so inequitable as to shock one's sense of equity:

With all due respect for the Court, appellees feel impelled to call the Court's attention to the fact that in arriving at the conclusion that "this fact (the prior recording of the mortgage)—is an answer to the equitable claims of the appellees" this Court seems to be relying on Arkansas law.

CONCLUSION

In conclusion appellees respectfuly submit that, for the reasons hereinabove stated, the opinion should be withdrawn and a rehearing granted, and that the judgment appealed from by the appellant should be affirmed. Appellees further pray that the issuance of any mandate be stayed until the Court shall have passed upon this Petition for Rehearing, and should this Petition be not granted that the issuance of a mandate be further stayed until petitioners may file a Petition for Writ of Certiorari in the Supreme Court of the United States.

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CERTIFICATE OF COUNSEL

The undersigned attorneys, A. L. Barber and E. DeMatt Henderson, hereby certify that this Petition for Rehearing is submitted in good faith and that they believe it to be meritorious.

A. L. Barber further certifies that he is authorized by W. D. Murphy, Jr., Attorney for certain of the Appellees and Petitioners, who is absent from the United States, to sign this certificate for and on his behalf.

A. L. Barber
E. DeMatt Henderson
W. D. Murphy, Jr.